ARBITRATION ADVISORY

96-03

BURDEN OF PROOF IN FEE ARBITRATIONS

June 7, 1996

Points of view or opinions expressed in this document are those of the Committee on Mandatory Fee Arbitration. They have not been adopted or endorsed by the State Bar's Board of Governors and do not constitute the official position or policy of the State Bar of California.

Under traditional rules of evidence, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he or she is asserting [Evidence Code § 500]. Thus, many arbitrators struggle with who may have the burden of proof in establishing such issues as the existence of a valid fee agreement, the voidability of the fee agreement for failure to comply with Business and Professions Code Section 6147 or 6148, the reasonableness of the fee, the unconscionability of the fee, the necessity of the work for which the fee was charged, the existence of some ethical violation, conflict of interest or malpractice which may defeat the attorney's right to a fee, and similar issues which come up in fee arbitrations.

In fee arbitrations, however, strict notions of who has the burden of proof rarely if ever should become determinative of the outcome of the proceeding, for a number of reasons. First, even under traditional rules of evidence in civil cases, trial courts have the discretion to reallocate the burden of proof as the circumstances may dictate. *See, generally,* 1 Witkin, California Evidence, 3d Ed., §§ 136-139.

The discretion of the trial court to alter the burden of proof may be exercised in light of a number of factors:

"In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact and the probability of the existence or nonexistence of the fact. . . . '[T]he truth is that there is no and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations.' [Worsley v. Municipal Court, (1981) 122 Cal.App.3d 409, 420 [176 Cal.Rptr.324].

Second, fee arbitrations are intended to be much less formal than trial proceedings. The Rules of Procedure for Fee Arbitrations and the Enforcement of

awards by the State Bar of California (the "Rules") have been promulgated to reflect this informality. Rule 34.0 specifically gives to the panel the discretion to alter the burden of proof as well as the burden of going forward with the evidence on any particular issue:

RULE 34.0. Manner of Proof

" The parties shall present their proof in a manner determined by the panel."

Additionally, under Rule 31.0, stipulations as to issues not in dispute and voluntary exchanges of documents prior to the hearing are encouraged. And, under Rule 33.0, formal adherence to the strict rules of evidence are waived:

RULE 33.0. Evidence

"Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule to the contrary."

Most local program rules contain similar provisions. Arbitrators should consult the local program rules which are applicable to the proceeding. The Rules thus reflect that the fee arbitrator or panel has great discretion to allocate the burden of proof as may be appropriate in each particular case, the ultimate requirement being only that such allocation be consistent with the requirement of Business and Professions Code Section 6200(d) that the Rules insure "a fair, impartial, and speedy hearing and award."

Accordingly, the fee arbitrator or panel should, upon informing itself as to the nature of the dispute based upon the initial submissions and opening statements of the parties, exercise its discretion to allocate to each party the initial burden of proof (as well as the burden of going forward with the evidence) as may be appropriate based upon what the parties claim is in dispute, the type of legal matter in dispute, the sources of proof concerning the facts relevant to that dispute, and public policy issues including the sophistication of the client, the nature of the relationship between the attorney and the client, and general notions of fiduciary responsibility and ethical behavior required of all attorneys.

In most cases, the initial burden of proof thus will fall upon the attorney who generally bears the responsibility of establishing the existence and terms of the fee agreement and who most often has superior knowledge about why certain services were performed, the reasonableness of the charges for those services, the billings rendered to the client, and his or her conformance with ethical precepts and applicable standards of care. In other cases, the same factors may make it more appropriate to allocate to the client the burden of proof, particularly where it is clear that the attorney may be unaware of the nature of the client's complaint or the alleged defalcation is not readily apparent from the submissions of the parties.

Ultimately, as in other civil cases, the sufficiency of evidence for a particular claim or position is based upon a preponderance. Therefore, the arbitrator or panel should rule as to each issue in favor of the party whom the evidence more convincingly favors than the evidence opposed to them, and not make its decision based upon traditional evidentiary rules concerning the burden of proof which more appropriately are applicable to formal court proceedings.